(1)
Supreme Court, U.S.
FILED
96 397 AUG 26 1996
OFFICE OF THE CLERK

No.

In The
Supreme Court of the United States

October Term, 1996

MUSHTAQ SAMUEL,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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45 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does § 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), empower an immigration judge to exercise discretion and terminate deportation proceedings against long-term lawfully admitted permanent residents of the United States who have been placed under deportation proceedings based on a conviction of possessing a firearm in violation of law?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF CITATIONS iv

OPINIONS BELOW 2

STATEMENT OF JURISDICTION 3

STATUTES INVOLVED 3

STATEMENT OF THE CASE 3

A. Statement of Material Facts. 3
B. Basis for Federal Jurisdiction Before the Court of the First Instance 6

ARGUMENT 7

Point 1: The Supreme Court should review this case to resolve the split that exists among the circuits. 7

Point 2: The Supreme Court should review this case because of the serious humanitarian issues involved. 7

Point 3: The Supreme Court should review this case to effect a construction of § 1182(c) that more fully achieves the statute's merciful purposes. 8

Point 4: The Supreme Court should review this case to prevent the absurd and constitutionally repugnant results of the Tenth Circuit's construction. 9

CONCLUSION 11

TABLE OF CITATIONS

Cases Cited: **Page**

Bedoya-Valencia v. INS, 6F.3d 891 (2nd Cir. 1993) 7

Kmoarenko v. INS, 35 F.3d 432 (9th Cir. 1994) 7

Matter of Silva, 16 I&N Dec. 26 (BIA, 1976) 4

Matter of Hernandez-Casillas, I&N Interim Decision #3147 (BIA 1990, Attorney General 1991) 5

Pardon v. INS, 13 F.3d 1455 (11th Cir. 1994) 7

Roderiguez v. INS, 9 F.3d 408 (5th Cir. 1993) 7

Statutes Cited:

US Constitution, amend . 14 9

8 U.S.C. § 1105a(a) 6

8 U.S.C. § 1182(c) 4, 5, 7-11

8 U.S.C. § 1251(a)(2)(c) 4

28 U.S.C. § 1254 3

APPENDIX

Appendix A - Order and Judgment of the Tenth Circuit Court of Appeals, Filed March 28, 1996 .. 1a

Page

Appendix B - Memorandum of Oral Decision of the Immigration Judge, Dated November 2, 1994 ..... 5a

Appendix C - Transcription of Oral Decision of the Immigration Judge, Dated November 2, 1994 ..... 8a

Appendix D - Decision of the Board of Immigration Appeals, Dated April 28, 1995 ..... 10a

Appendix E - Order Denying Petition for Rehearing Tenth Circuit Court of Appeals, Entered May 28, 1996 ..... 13a

Appendix F - The Text of Pertinent Portions of 8 U.S.C. § 1182 ..... 15a

Appendix G - The Text of Pertinent Portions of 8 U.S.C. § 1251(a) 25a

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Mushtaq Samuel, respectfully requests that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Tenth Circuit issued on March 28, 1996.

OPINIONS BELOW

On November 2, 1994, the Honorable J.P. Vandello, Immigration Judge, made an oral decision in File No. A37 515 631 denying Mushtaq Samuel's application for discretionary relief and ordering him deported to Pakistan. A Memorandum of Oral Decision was entered into the official record of proceedings, the text of which is set in Appendix "B."

The Oral Decision was later transcribed, the text of which is set forth in Appendix "C."

On April 28, 1995, the Board of Immigration Appeals (the "BIA") entered an Order in the same case sustaining the decision of the immigration judge. The Order was not designated as a precedent decision and therefore has no citation reference other than the administrative case number. The text of the Order is set forth in Appendix "D."

On March 28, 1996, The Tenth Circuit Court of Appeals entered an Order and Judgment in Case No. 95-9523 sustaining the BIA. The opinion was not ordered published and has no citation other than the Tenth Circuit's case number. The text of the Order and Judgment is set forth in Appendix "A."

On May 28, 1996, the Tenth Circuit Court of Appeals entered an Order in Case No. 95-9523 denying a petition for a rehearing. The opinion was not ordered published and has no citation other than the Tenth Circuit's case number. The text of the Order and Judgment is set forth in Appendix "E."

STATEMENT OF JURISDICTION

On March 28, 1996, the United States Court of Appeals for the Tenth Circuit entered its decision affirming the decision of the BIA.

Petitioner brought a Petition for Rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure. The Order denying the Petition was entered on May 28, 1996. This Petition for Writ of Certiorari is timely filed within ninety days of the denial of the Petition for Rehearing.

The Supreme Court's jurisdiction to review, on a writ of certiorari, the decision of the United States Court of Appeals for the Tenth Circuit affirming the decision of the BIA is conferred by 28 U.S.C. § 1254.

STATUTES INVOLVED

The two statutes involved are 8 U.S.C. § 1182(a) and (c) and 8 U.S.C. § 1251(a), the full texts of which are set forth in Appendices "F" and "G," respectively.

STATEMENT OF THE CASE

A. Statement of Material Facts.

Petitioner, Mushtaq Samuel, immigrated with his family to the United States from Pakistan at the age of nine. He has lived here ever since, has been fully acculturated into an American lifestyle, and has no meaningful ties to Pakistan.

Shortly after Mushtaq's eighteenth birthday, he was convicted of possession of an unregistered firearm, for which he was imprisoned twenty-seven months. Upon his release, the

Immigration and Naturalization Service ("INS") placed him under deportation proceedings, alleging deportability under 8 U.S.C. § 1251(a)(2)(C), which provides that "any alien who at any time after entry is convicted under any law of . . . possessing . . . any firearm . . . in violation of any law is deportable." At his deportation hearing, Mushtaq admitted deportability, but sought to have the proceedings terminated in the exercise of discretion under 8 U.S.C. § 1182(c).

Because of its critical role in the case, some background regarding § 1182(c) is essential. Considered by many to be the most merciful section in the Immigration and Nationality Act, that section simply allows an immigration judge to terminate exclusion proceedings in the exercise of discretion in any case involving a lawfully admitted permanent resident of the United States who is returning to a lawful unrelinquished domicile of seven years. The relief is unavailable, however, if the alleged ground of exclusion involves a national security violation, terrorism, and international child abduction, or if the alien has been convicted of an aggravated felony for which a five year prison term has actually been served. The section, at least as it was worded when this case was under consideration, actually said nothing about deportation proceedings, but on equal protection grounds the BIA held in Matter of Silva, 16 I&N Dec. 26 (BIA, 1976), that its benefits may be sought in deportation proceedings as well. Thereafter, § 1182(c) has frequently been used on humanitarian grounds to terminate deportation proceedings involving long-term permanent residents who would otherwise face certain deportation.

Some fourteen years after Silva, a related legal controversy developed regarding the application of § 1182(c) in deportation cases where the ground of deportation is not also

a ground of exclusion.[1] Initially, the BIA held that § 1182(c) empowered an immigration judge to terminate deportation proceedings in any otherwise appropriate case as long as the ground of deportation involved was not one of the exceptions listed in § 1182(c) - i.e., national security violations, terrorism, international child abduction, and aggravated felonies for which a five year prison term has been served.[2] The Attorney General, however, overruled the BIA and held that the benefits of § 1182(c) can only apply in deportation cases where the specific ground of deportation has an equivalent ground of exclusion.[3] The circuit courts have since split on the issue, some adopting the reasoning of the BIA's original decision, others the reasoning of the Attorney General.

Mushtaq's case was heard after the Attorney General overruled the BIA's position on the issue. And because firearms convictions are grounds of deportation but not grounds of exclusion, the immigration judge, notwithstanding compelling equities, including solid rehabilitation, the aberrational nature of the underlying criminal incident, questionable legal advice in the criminal proceeding, his otherwise good moral character, and the extreme hardships incident to separating him from his immediate family and sending him to a land he left as a child over thirteen years earlier and to which he has no meaningful ties, ruled that Mushtaq was ineligible for § 1182(c) relief as a matter of law. He therefore declined to even reach the merits of his application

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[1]The two principal grounds are entry without inspection and firearms violations, both of which are grounds of deportation, but neither of which are grounds of exclusion.

[2]See Matter of Hernandez-Casillas, I&N Interim Decision #3147 (BIA 1990, Attorney General 1991).

[3]Id.

and the humanitarian factors involved, and ordered Mushtaq deported to Pakistan.

Mushtaq appealed the judge's decision to the BIA, which affirmed the immigration judge. He then appealed to the Tenth Circuit Court of Appeals, which reluctantly affirmed the BIA, noting however its sense that "what the Attorney General is doing is abominable given the circumstances."[4]

Mushtaq now petitions this court of last resort as the only means of preventing a personal tragedy of great proportion, which is directly due to the Attorney General's wrong construction of 8 U.S.C. § 1182(c).

B. Basis for Federal Jurisdiction Before the Court of the First Instance

Appellate jurisdiction in this case was conferred upon the Tenth Circuit Court of Appeals by 8 U.S.C. § 1105a(a), which establishes the procedure for judicial review of final orders of deportation.

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[4]See Order and Judgement of the Tenth Circuit Court of Appeals, Appendix A, last sentence.

ARGUMENT

The Supreme Court should review this case for the following reasons.

Point 1: **The Supreme Court should review this case to resolve the split that exists among the circuits.**

There is a split among the circuits regarding the construction of 8 U.S.C. § 1182(c) and whether it empowers an immigration judge to terminate deportation proceedings where the ground of deportation is not also a ground of exclusion. The Second Circuit has followed the BIA and construed it to allow an immigration judge to waive grounds of deportability that do not have an equivalent ground of excludability.[5] The Fifth, Ninth, Tenth, and Eleventh Circuits have construed it to allow an immigration judge to waive only those grounds of deportability that have an identical ground of excludability.[6] The Supreme Court should review this case to resolve the split that exists among the circuits.

Point 2: **The Supreme Court should review this case because of the serious humanitarian issues involved.**

Deportation and expulsion, the modern equivalents to

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[5]See Bedoya-Valencia v. INS, 6 F.3d 891 (2nd Cir. 1993).

[6]In addition to the 10th Circuit's ruling in the instant case, see, for example, Rodriguez v. INS, 9 F.3d 408 (5th Cir. 1993), Kmoarenko v. INS, 35 F.3d 432 (9th Cir. 1994), and Rodriguez-Pardon v. INS, 13 F.3d 1455 (11th Cir. 1994).

banishment, are harsh under any circumstances. They disrupt lives, tear families apart, ruin careers, inject people into cultures and environments which are often hostile and unfamiliar, jeopardize health and life, drag people to and over the brink of poverty, wreck marriages, scar the lives of innocent others, and destroy much hope and happiness. But the consequences are particularly harsh in the lives of long-term permanent residents, whose roots are deeper, and whose lives are more fully integrated into American society.

The issue involved here is important because it affects individuals and families in such a profound and permanent way. By deciding to take this case, the Supreme Court will be able to decide just how much mercy an immigration judge can show, and whether or not long-term permanent residents in a position like Mushtaq's can obtain relief when the equities warrant it. Because of the profound humanitarian interests involved and the context in which the issue arises, i.e. the deportation of long-term permanent residents, the Supreme Court should review this case.

Point 3: **The Supreme Court should review this case to effect a construction of § 1182(c) that more fully achieves the statute's merciful purposes.**

Section 1182(c), which many believe to be the single most merciful provision of the entire Immigration and Nationality Act, § 212(c), addresses one of the most agonizing issues that arises under immigration law: what to do in the cases of long-term permanent residents who for one reason or another become excludable or deportable. By allowing immigration judges to terminate proceedings in such cases, § 1182(c) is a ray of mercy, and its merciful object should underlie its construction. If the Supreme Court does not review this case and reverse the Tenth Circuit, it will allow case decisions to

stand that undermine the mercy implicit in the statute. The Supreme Court should therefore review this case and use it as a vehicle to make available the merciful relief that Congress intended when it enacted the statute.

Point 4: **The Supreme Court should review this case to prevent the absurd and constitutionally repugnant results of the Tenth Circuit's construction.**

Congress has plenary power to regulate immigration, and was free to create § 1182(c) relief or not. But having chosen to create that relief, the equal protection clause of the Fourteenth Amendment requires Congress to make the benefit available to members of the protected class fairly without making arbitrary, capricious, and irrational distinctions, which result in absurdities. The construction adopted by the Tenth Circuit leads to such absurdities. Consider, for example, the following hypotheticals, each of which assumes the aliens involved are otherwise qualified for § 1182(c) relief:

1. Alien A is convicted of a felony firearm violation in Canada while visiting relatives. Alien B is convicted of an identical crime in the United States. Under the Tenth Circuit's construction, A would be re-admitted, while B would be deported.

2. Alien A is convicted of carrying a loaded hunting rifle under the seat of his pick-up truck, a class B misdemeanor, for which he is fined $250.00. Alien B is convicted of robbing a bank at knife-point for which he is fined $10,000 and sentenced to four years in prison. A would be deported, B would not.

3. Alien A is convicted of attempting to purchase a gun without waiting for the full statutory waiting period. Alien B is

convicted of trying to purchase a substantial amount of cocaine. A would be deported, B would not.

4. Alien A unlawfully discharges a .22 caliber rifle in an area of the county where it is prohibited. Alien B smuggles people into the United States across the Canadian border. A would be deported, B would not.

5. While hunting, Alien A sees a rabbit in a field across the road and shoots at it, violating a state law prohibiting discharging a firearm across a road, a class B misdemeanor. Alien B falsifies his identity papers and engages in a drug ring selling drugs to minors. A would be deported, B would not.

Such hypotheticals could be generated ad nauseam, but the point has been made: the construction of § 1182(c) creates arbitrary distinctions with no rational basis. It arbitrarily treats all gun related crimes, regardless of seriousness, as more serious than any other crime, provided the sentence actually served is less than five years. It arbitrarily and without any rational basis lumps all gun related crimes, even the most minor, into the same class as terrorism and international child abduction. Under the Tenth Circuit's construction, § 1182(c) relief is denied to anyone convicted of any firearms related offense, but extended to others who have been convicted of crimes which are clearly more serious when penalties are compared.

This very case shows the absurdity of the adopted construction of § 1182(c), for if it is allowed to stand, it will be as if the United States government is saying to Mushtaq: "It would have been better for you to commit a more serious crime not involving a firearm, for then you would be eligible for § 1182(c) relief. But because your particular crime involved a firearm, you are statutorily ineligible for relief. True, we have the power to show mercy to robbers, burglars, frauds, drug

dealers, forgers, murderers, embezzlers, rapists, extortionists, blackmailers, counterfeiters, arsonists, scam artists, and criminals of almost every type and variety, provided they are not involved in security violations, terrorism, or international child abduction, and provided they do not spend more than five years in prison, but we cannot show mercy to you."

CONCLUSION

The Supreme Court should review this case to resolve a split among the circuit courts, to address the compelling human interests affected, to effect the merciful purposes of § 1182(c), and to prevent the type of absurd results that inescapably arise by denying relief to persons convicted of firearms violations while extending them to persons convicted of more serious crimes.

Respectfully submitted this 24th day of August, 1996.

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APPENDIX A

ORDER AND JUDGMENT OF THE TENTH CIRCUIT COURT OF APPEALS FILED MARCH 28, 1996

FILED
United States Court of Appeals
Tenth Circuit
MAR 28 1996
Patrick Fisher
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MUSHTAQ SAMUEL,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

No. 95-9523

On Petition for Review From the
Board of Immigration Appeals
(No. A37-515-631)

Appendix A

ORDER AND JUDGMENT[7]

Before: PORFILIO, KELLY and LUCERO, Circuit Judges.[8]

Petitioner Mushtaq Samuel, who immigrated to the United States in 1981 when he was nine years old, seeks review of the Board of Immigration Appeals' decision that he is ineligible for a waiver of inadmissibility, 8 U.S.C. § 1182(c). He concedes deportability having been convicted of a firearms violation. See 8 U.S.C. § 1251(a)(2)(C). Our jurisdiction arises under 8 U.S.C. § 1105a(a).

Section 1182(c) pertains to the admissibility of permanent resident aliens returning to the United States and allows the Attorney General to waive numerous grounds of exclusion. The statute has been extended, on equal protection grounds, to some deportation cases involving long-term permanent residents. See Francis v. INS, 532 F.2d 268, 272-73 (2nd Cir. 1976). A requirement of the statute's application in the deportation context has been that the ground of deportation

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[7]This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

[8]After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

to be waived must have an analogous ground of exclusion which could be waived under § 1182(c). Komarenko v. INS, 35 F.3d 432, 434 (9th Cir. 1994). It has been held, over constitutional challenge, that § 1182(c) waiver is unavailable when the ground of deportation is a firearms conviction because there is not sufficiently analogous ground of exclusion. See Gjonaj v. INS, 47 F.3d 823 (6th Cir. 1995); Rodriguez-Padron v. INS, 13 F.3d 1455 (11th Cir. 1994); Rodriguez v. INS, 9 F.3d 408 (5th Cir. 1993); Campos v. INS, 961 F.2d 309 (1st Cir. 1992); Cabasug v. INS, 847 F.2d 1321 (9th Cir. 1988). This is not a case where the ground of deportation "could not conceivably have" a counterpart among the statutory ground of exclusion. See Bedoya-Valencia v. INS, 6 F.3d 891, 897 (2d Cir. 1993) (extending § 1182(c) where ground of deportation was entry without inspection).

We have carefully considered Petitioner's arguments for a contrary interpretation, but we cannot conclude that the Attorney General's interpretation and limitation of this judicially-created doctrine is unreasonable. We do recognize that Mr. Samuel will be deported to Pakistan, a country with which he has few ties and little experience, having spent his childhood and early adult life with his family in the United States. While we may be of the opinion that what the Attorney General is doing is abominable given the circumstances, all of the precedent leads only to one rule of law, from which we are not inclined to depart.

REVIEW DENIED.

Appendix A

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

APPENDIX B

MEMORANDUM OF ORAL DECISION OF THE IMMIGRATION JUDGE DATED NOVEMBER 2, 1994

U.S. Department of Justice
Executive Office for Immigration Review
Office of the Immigration Judge
Denver, CO 80202

File: A37-315-631

IN THE MATTER OF MUSHTAQ SAMUEL, Respondent.

IN DEPORTATION PROCEEDINGS

MEMORANDUM OF ORAL DECISION

___ Respondent/Applicant was granted/denied asylum under Section 208(a) of the act.

___ Respondent/applicant was granted/denied withholding of deportation under Section 243(h) of the Act.

_X_ Respondent was denied relief under Section 212(c).

___ Respondent was granted/denied suspension of deportation under Section 244(a) of the Act.

___ Applicant/Respondent was granted a waiver under Section _____ of the Act and the proceedings were terminated.

___ Respondent was granted/denied adjustment of status

under Section 234 of the Act.

___ The Applicant's request for leave to withdraw the application for admission to the United States was granted.

___ Applicant is admitted as a _____ Nonimmigrant until _____.

___ The proceedings were terminated.

___ Applicant has been ordered excluded and deported from the United States.

___ Respondent was granted voluntary departure on or before _____.

_X_ Respondent was ordered deported to Pakistan.

___ The Service/Respondent/Applicant has/have waived appeal.

_X_ The Respondent has reserved appeal which must be filed by 11-14-94.

_XX_ THIS MEMORANDUM HAS BEEN SERVED ON THE RESPONDENT/APPLICANT AND COUNSEL.

If the decision is appealed, the full text of the oral decision will be transcribed and will become the official decision.

Other: Sitting at Salt Lake City.

Appendix B

Date: 11-2-94

s/J.P. Vandello
Immigration Judge
J.P. Vandello

APPENDIX C

TRANSCRIPTION OF ORAL DECISION OF THE IMMIGRATION JUDGE DATED NOVEMBER 2, 1994

U.S. Department of Justice
Executive Office for Immigration Review
Office of the Immigration Judge
Salt Lake City, Utah

November 2, 1994

File: A37-315-631

IN THE MATTER OF MUSHTAK [sic] SAMUEL, Respondent.

IN DEPORTATION PROCEEDINGS

CHARGE: FIREARMS CONVICTION

APPLICATIONS: 212(c) WAIVER

ON BEHALF OF RESPONDENT: L n [sic] McMurray, Esq.

ON BEHALF OF SERVICE: Don Davis, Esq.

ORAL DECISION OF THE IMMIGRATION JUDGE

This respondent is 22 years of age, a native and citizen of Pakistan. He entered the United States at New York, New York, on November 28th, 1981, as an immigrant. He is charged with deportability for what is considered an "aggravated" grounds, that is, relief is limited. That ground is that he was

convicted of possession of an unregistered firearm in the United States District Court, Salt Lake City, Utah on March 31, 1992. In support of that allegation, the Service has submitted the conviction record, Exhibit 2.

The respondent filed for a Section 212(c) waiver, but my finding is he is not eligible for that waiver. 212(c) is a statue which was designed to benefit aliens in exclusion proceedings who found themselves excludable. It has never been applied to deportation cases by operation of law, but only by court decision and the acquiescence of the Board of Immigration Appeals. Precedents hold that if there is no concurrent ground of deportability and excludability, the respondent may not receive that relief. I find that since there is not exclusionary grounds for a firearms violation, the respondent may not be granted this waiver in deportation proceedings.

As was stated, it is possible there may be relief available to him down the road with an approved visa petition, but that is something that is not available now. He has named no country for deportation. Accordingly, Pakistan was directed. He did not apply for asylum.

ORDER

IT IS HEREBY ORDERED that the respondent be deported to Pakistan on the charge in the Order to Show Cause.

s/J.P. Vandello
JAMES P. VANDELLO
Immigration Judge

APPENDIX D

DECISION OF THE BOARD OF IMMIGRATION APPEALS DATED APRIL 28, 1995

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A37 515 631 - Salt Lake City

Date: APR 28 1995

In re: MUSHTAQ SAMUEL

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Lynn C. McMurray, Esquire
McMurray, McMurray, Dale & Parkinson
The Hermes Building
455 East 500 South, Suite 300
Salt Lake City, Utah 84111

CHARGE:

Appendix D

Order: Sec. 241(a)(2)(C), I&N Act [8 U.S.C. § 1251(a)(2)(C)] - Convicted of firearms violation

APPLICATION: Waiver of inadmissibility

ORDER:

PER CURIAM. The decision of the Immigration Judge dated November 2, 1994, which found the respondent deportable as charged, found him ineligible for a waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act, 8 U.S. C. § 1182(c), and ordered him deported from the United States to Pakistan, is affirmed.

At his deportation hearing, the respondent, through counsel, admitted the allegations contained in the Order to Show Cause, including the allegation that he was convicted on March 31, 1992, in the United States District Court, District of Utah, for the offense of possession of an unregistered firearm, in violation of 26 U.S.C. §§ 5861(d) and 5871, and conceded his deportability. The only issue on appeal is whether the Immigration Judge should have found the respondent eligible to pursue an application for section 212(c) relief.

The respondent contends that Matter of Hernandez-Casillas, Interim Decision 3147 (BIA 1990; A.G. 1991), aff'd, 983 F.2d 231 (5th Cir. 1993), was wrongly decided by the Attorney General, and that the Board should certify this matter to her in order that she may reconsider that determination. He maintains that he has been deprived of due process and the equal protection of the law by the decision in Hernandez-Casillas, which has led to absurd and arbitrary results.

Appendix D

The Attorney General found in Hernandez-Casillas, supra, and this Board has followed that determination, that an alien deportable under section 212(a)(2)(C) of the Act, 8 U.S.C. § 1251(a)(2)(C), on the basis of his conviction for a firearms offense is ineligible for relief from deportation under section 212(c) of the Act because there is no exclusion ground corresponding to the deportation ground for conviction of a firearms offense. See Matter of Chow, Interim Decision 3199 (BIA 1993), aff'd, 12 F.3d 34 (5th Cir. 1993); Matter of Montenegro, Interim Decision 3192 (BIA 1992); Matter of Hernandez-Casillas, supra. Moreover, a number of the United States Courts of Appeals have held the same. See Gjonaj v. INS, 47 F.3d 824 (6th Cir. 1995); Rodriguez-Padron v. INS, 13 F.3d 1455 (11th Cir. 1994); Rodriguez v. INS, 9 F.3d 408 (5th Cir. 1993); Campos v. INS, 961 F.2d 309 (1st Cir. 1992); Cabasug v. INS, 847 F.2d 1321 (9th Cir. 1988).

Given that the respondent is deportable as an alien convicted of a firearms offense, the Immigration Judge correctly concluded that he is statutorily ineligible for relief under section 212(c) of the Act. We decline to certify this matter to the Attorney General for further consideration of this issue.

Accordingly, the Immigration Judge's decision is affirmed.

s/ Mary Maguire Dunn
For the Board

APPENDIX E

ORDER DENYING PETITION FOR REHEARING TENTH CIRCUIT COURT OF APPEALS ENTERED MAY 28, 1996

No. 95-9523

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MUSHTAQ SAMUEL,

Petitioner,

v.

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

ORDER
Entered May 28, 1996

Before PORFILIO, KELLY, and LUCERO, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

Appendix E

Entered for the Court

PATRICK FISHER, Clerk

By s/ L. Bahzano
Deputy Clerk

APPENDIX F

THE TEXT OF PERTINENT PORTIONS OF 8 U.S.C. § 1182

8 U.S.C. § 1182. Excludable aliens

(a) Classes of excludable aliens

Except as otherwise provided in this chapter, the following describes classes of excludable aliens who are ineligible to receive visas and who shall be excluded from admission into the United States:

(2) Criminal and related grounds

(A) Conviction of Certain Crimes

(i) In General

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of --

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled

substance (as defined in section 802 of Title 21),

is excludable.

(ii) Exception

Clause **(i)(I)** shall not apply to an alien who committed only one crime if --

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application of readmission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed)

(B) Multiple criminal convictions

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trail or whether the offenses arose from a single scheme of misconduct and regardless

of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement actually imposed were 5 years or more is excludable.

(C) Controlled substance traffickers

Any alien who the consular or immigration officer knows or has reason to believe is or has been an illicit trafficker in any such controlled substance or is or has been a knowing assister, abettor, conspirator, or colluder with others in the illicit trafficking in any such controlled substance, is excludable.

(D) Prostitution and commercialized vice

Any alien who--

(I) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution with 10 years of the date of application for a visa, entry, or adjustment of status,

(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, entry, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution, or

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution,

is excludable.

(E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution

Any alien--

(i) who has committed in the United States at any time a serious criminal offense (as defined in section 1101(h) of this title),

(ii) for whom immunity from criminal jurisdiction was exercised with respect to that offense,

(iii) who has a consequence of the offense and exercise of immunity has departed from the United States, and

(iv) who has not subsequently submitted fully to the jurisdiction of the court in the United States having jurisdiction with respect to that offense,

is excludable.

(F) Waiver authorized

For provision authorizing wavier of certain subparagraphs of this paragraph, see subsection (h) of this section.

(3) Security and related grounds

(A) In general

Appendix F

Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in --

(i) any activity (I) to violate any law of the United States relating to espionage or sabotage or (II) to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information.

(ii) any other unlawful activity, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of the Government of the United States by force, violence, or other unlawful means,

is excludable.

(B) Terrorist activities

(i) In general

Any alien who--

(I) has engaged in a terrorist activity, or

(II) a consular officer or the Attorney General knows, or has reasonable ground to believe, is likely to engage after entry in any terrorist activity (as defined in clause (iii)),

is excludable. An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this chapter, to be engaged in a terrorist activity.

(ii) Terrorist activity defined

As used in this chapter, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of Title 18) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any--

(a) Biological agent, chemical agent, or nuclear weapon or device, or

(b) Explosive or firearm (other than for mere personal monetary gain),

with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

(iii) Engage in terrorist activity defined

As used in this chapter, the term "engage in terrorist activity" means to commit, in an individual capacity or as a member of an organization, an act of terrorist activity or an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity at any time, including any of the following acts:

(I) The preparation or planning of a terrorist activity.

(II) The gathering of information on potential targets for terrorist activity.

(III) The providing of any type of material support, including a safe house, transportation, communications, funds, false identification, communications, funds, false identification, weapons, explosives, or training, to any individual the actor knows or has reason to believe has committed or plans to commit a terrorist activity.

(IV) The soliciting of funds or other things of value for terrorist activity or for any terrorist organization.

Appendix F

(V) The solicitation of any individual for membership in a terrorist organization, terrorist government, or to engage in a terrorist activity.

(C) Foreign policy

(I) In general

An alien whose entry or proposed activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United State is excludable.

. . .

(D) Immigrant membership in totalitarian party

(I) Any immigrant who is or has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision or affiliate thereof), domestic or foreign, is excludable.

. . .

(E) Participants in Nazi persecutions or genocide

(i) Participation in Nazi persecutions

Any alien who, during the period beginning on March 23, 1933 and ending on May 8, 1945, under the direction of, or in association with--

(I) the Nazi government of Germany,

Appendix F

(II) any government in any area occupied by the military forces of the Nazi government of Germany.

(III) any government established with the assistance or cooperation of the Nazi government of Germany, or

(IV) any government which was an ally of the Nazi government of Germany,

ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion is excludable.

(ii) Participation in genocide

Any alien who has engaged in conduct that is defined as genocide for purposes of the International Convention on the Prevention and Punishment of Genocide is excludable.

. . .

(9) Miscellaneous

. . .

(C) International child abduction

(i) In general

> Except as provided in clause (ii), any alien who, after entry of an order by a court in the United States granting custody to a person of a United States citizen child who detains or retains the child, or withholds custody of the child, outside the United States from the person granted custody by that order, is excludable until the child is surrendered to the person granted custody by that order.

(c) Nonapplicability of subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.[9]

---

[9]The wording of § 1182(c) shown here is how the statute read at the time of Mushtaq's hearing. The section was amended on April 24, 1996, and now reads as follows:
INA § 241(a)(2)(A)(i)(II)

> "is convicted of a crime for which a sentence of one year or longer may be imposed." [only effective for aliens against

APPENDIX G

THE TEXT OF PERTINENT PORTIONS OF 8 U.S.C. § 1251(a)

8 U.S.C. § 1251. Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in the United States shall, upon the order of the Attorney General, be deported if the alien is within one or more of the following classes of deportable aliens:

(2) Criminal Offenses

(A) General crimes

(i) Crimes of moral turpitude

---

whom deportation proceedings are initiated after enactment of the Act 4/24/96]

INA § 212(c) [amended]

"... This subsection shall not apply to an alien who [1] has been convicted of one or more aggravated felonies and [2] is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii)[aggravated felony], (B) [controlled stubstances], (C)[certain firearms offenses], or (D) [miscellaneous crimes] for which both predicate offenses are covered by section 241(a)(2)(A)(i) [crimes of moral turpitude]."

Appendix G

Any alien who--

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(i) of this title) after the date of entry, and

(II) either is sentenced to confinement or is confined therefor in a prison or correctional institution for one year or longer,

is deportable.

(ii) Multiple criminal convictions

Any alien who at any time after entry is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after entry is deportable.

(iv) Waiver authorized

Clauses (I), (ii), and (iii) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the president of the United States or by the Governor of any of the several States.

Appendix G

(B) Controlled substances

(i) Conviction

Any alien who at any time after entry has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21); other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

(ii) Drug abusers and addicts

Any alien who is, or at any time after entry has been, a drug abuser or addict is deportable.

(C) Certain firearms offenses

Any alien who at any time after entry is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of Title 18) in violation of any law is deportable.

Appendix G

(D) Miscellaneous crimes

Any alien who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate--

(i) any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of Title 18, for which a term of imprisonment of five or more years may be imposed;

(ii) any offense under section 871 or 960 of Title 18;

(iii) a violation of any provision of the Military Selective Service Act (50 U.S.C. App. 451 et seq.) Or the Trading With the Enemy Act (50 U.S.C. App. 1 et seq.); or

(iv) a violation of section 1185 or 1328 of this title ,

is deportable.

. . .

(2)

Supreme Court, U.S.
FILED
NOV 14 1996
CLERK

No. 96-397

In the Supreme Court of the United States

OCTOBER TERM, 1996

MUSHTAQ SAMUEL

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that petitioner was ineligible for a waiver of inadmissibility under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c), because he was deportable for having been convicted of unlawfully possessing a firearm, a ground of deportation that has no counterpart in exclusion.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	3
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Bedoya-Valencia v. *INS*, 6 F.3d 891 (2d Cir. (1990)	5, 6
Cabasug v. *INS*, 847 F.2d 1321 (9th Cir. 1988)	5
Campos v. *INS*, 961 F.2d 309 (1st Cir. 1992)	4, 5
Cato v. *INS*, 84 F.3d 597 (2d Cir. 1996)	4, 5, 6
Dashto v. *INS*, 59 F.3d 697 (7th Cir. 1995)	5
Fiallo v. *Bell*, 430 U.S. 787 (1977)	5
Francis v. *INS*, 532 F.2d 268 (2d Cir. 1976)	3, 4
Gjonaj v. *INS*, 47 F.3d 824 (6th Cir. 1995)	5
Hernandez-Casillas v. *INS*, Interim Dec. No. 3147 (Att'y Gen. Mar. 19, 1991), aff'd mem., 983 F.2d 231 (5th Cir. 1993)	4
Leal-Rodriguez v. *INS*, 990 F.2d 939 (7th Cir. 1993)	6
Rodriguez v. *INS*, 9 F.3d 408 (5th Cir. 1993)	4-5
Rodriguez-Padron v. *INS*, 13 F.3d 1455 (11th Cir. 1994)	5
Silva, In re, 16 I. & N. Dec. 26 (BIA 1976)	3, 4

Constitution and statutes:

U.S. Const. Amend. V	3
Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009	6
§ 304	6
§ 304(a)	6
§ 304(b)	6

Statutes—Continued: Page

§ 309(a) 6
§ 309(c) 6
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:
§ 212(c), 8 U.S.C. 1182(c) 2, 3, 4, 6, 7
§ 241(a)(1)(B), 8 U.S.C. 1251(a)(1)(B) 5
§ 241(a)(2)(C), 8 U.S.C. 1251(a)(2)(C) 2

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unpublished, but the decision is noted at 81 F.3d 173 (Table). The order of the Board of Immigration Appeals (Pet. App. 10a-12a) and the decision of the immigration judge (Pet. App. 8a-9a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1996. A petition for rehearing was denied on May 28, 1996. Pet. App. 13a-14a. The petition for a writ of certiorari was filed on August 26, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a native and citizen of Pakistan, entered the United States as an immigrant in 1981. On March 31, 1992, he was convicted of possessing an unregistered firearm. Upon his release from incarceration, he was charged by the Immigration and Naturalization Service (INS) with deportability on account of his firearms conviction. Petitioner conceded that he was deportable under Section 241(a)(2)(C) of the Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(2)(C), but sought a waiver of inadmissibility under Section 212(c) of the INA, 8 U.S.C. 1182(c). Pet. App. 2a, 8a-9a.

On November 2, 1994, an immigration judge found that petitioner was deportable as charged and that he was statutorily ineligible for a Section 212(c) waiver. Pet. App. 8a-9a. The Board of Immigration Appeals (BIA) affirmed. Pet. App. 10a-12a. Consistent with its prior decisions and with uniform judicial precedent, the BIA held that it had no power to grant petitioner a waiver of inadmissibility under Section 212(c), because petitioner was deportable on the basis of his conviction for a firearms offense and there was "no exclusion ground corresponding to the deportation ground for conviction of a firearms offense." Pet. App. 12a.

2. The court of appeals denied the petition for review. The court observed that, while Section 212(c) pertains only to the admissibility of permanent resident aliens returning to the United States, the Attorney General's authority to grant discretionary relief from exclusion has been extended because of equal protection concerns to cases in which an alien is subject to deportation on grounds for which he

could have been excluded had he left the country and sought to return. Pet. App. 2a (citing *Francis* v. *INS*, 532 F.2d 268, 272-273 (2d Cir. 1976)).* It noted, however, that the Attorney General will consider an application for a waiver of deportation only when the ground of deportation to be waived has "an analogous ground of exclusion that could be waived under [Section 212(c)]." Pet. App. 2a-3a. Agreeing with the Attorney General and with the other courts of appeals that have ruled on the matter, the court held that a "[Section 212(c)] waiver is unavailable when the ground of deportation is a firearms conviction because there is no sufficiently analogous ground of exclusion." Pet. App. 3a; see also *ibid.* ("[A]ll of the precedent leads only to one rule of law, from which we are not inclined to depart.").

ARGUMENT

Petitioner argues (Pet. 7-11) that he is statutorily eligible for a waiver of inadmissibility under Section 212(c), notwithstanding the fact that there is no ground of exclusion analogous to the ground on which he is deportable—conviction of unlawful possession of a firearm. The court of appeals correctly rejected that argument, and its decision is consistent with the

---

* In *Francis*, the Second Circuit held that the equal protection guarantee implicit in the Fifth Amendment requires the Attorney General to apply Section 212(c) to aliens who are subject to deportation based on a ground of deportability that is also a ground of exclusion. 532 F.2d at 272-273. The court reasoned that, if an alien would have been eligible for a waiver of inadmissibility had he departed the country and sought to return, he should equally be eligible for a waiver of deportation if he never left. *Ibid.* The Board adopted that position in *In re Silva*, 16 I. & N. Dec. 26 (BIA 1976).

holding of every court of appeals that has considered the matter.

1. Section 212(c) provides that certain classes of permanent resident aliens who have departed the country and are excludable under the Act upon reentry may nonetheless be admitted in the discretion of the Attorney General. See 8 U.S.C. 1182(c). Although Section 212(c) does not, on its face, address deportees, the right to be considered for discretionary relief has, because of equal protection concerns, been extended to deportees whose grounds for deportation are analogous to grounds for exclusion that are subject to Section 212(c) waiver. See *Francis*, 532 F.2d at 272; *In re Silva*, 16 I. & N. Dec. at 30. The Attorney General has recognized, however, that the nontextual application of Section 212(c) may be extended no further than necessary to placate constitutional concerns, and the Section can therefore have no application to a deportee whose ground for deportation is one for which there is no substantially equivalent ground for exclusion, such as conviction of a firearms offense. See *Hernandez-Casillas* v. *INS*, Interim Dec. No. 3147 (Att'y Gen. Mar. 18, 1991), aff'd mem., 983 F.2d 231 (5th Cir. 1993).

There is no conflict among the circuits on this issue. Every court of appeals that has decided the question agrees with the Attorney General that Section 212(c) does not authorize her to grant a waiver of deportation to an alien who has been found deportable for having been convicted of a firearms offense, because conviction of a firearms offense is a ground of deportation for which there is no analogous ground of exclusion. See *Campos* v. *INS*, 961 F.2d 309, 314-317 (1st Cir. 1992); *Cato* v. *INS*, 84 F.3d 597, 599-602 (2d Cir. 1996); *Rodriguez* v. *INS*, 9 F.3d 408, 410-414 (5th

Cir. 1993); *Gjonaj* v. *INS*, 47 F.3d 824, 827 (6th Cir. 1995); *Dashto* v. *INS*, 59 F.3d 697, 700 n.2 (7th Cir. 1995); *Cabasug* v. *INS*, 847 F.2d 1321, 1322-1327 (9th Cir. 1988); *Rodriguez-Padron* v. *INS*, 13 F.3d 1455, 1458-1461 (11th Cir. 1994).

The courts of appeals have correctly rejected the argument, asserted here by petitioner (Pet. 9-11), that it was irrational (and therefore unconstitutional) for Congress to afford no avenue for discretionary relief to an alien who is deportable by reason of having been convicted of a firearms offense, while authorizing the Attorney General to waive the deportation of aliens whose grounds for deportation consist of "more serious offenses." The Constitution does not require "Congress to lay out crimes on a spectrum, and grant at least as much discretion for the less serious as for any more serious crimes." *Cabasug*, 847 F.2d at 1327; accord *Cato*, 84 F.3d at 602; *Rodriguez-Padron*, 13 F.3d at 1459. Congress had "a 'facially legitimate and bona fide reason' to treat weapons offenders and other offenders differently," *Cato*, 84 F.3d at 602 (quoting *Fiallo* v. *Bell*, 430 U.S. 787, 794 (1977)); see also *Rodriguez-Padron*, 13 F.3d at 1459; *Rodriguez*, 9 F.3d at 413-414; *Campos*, 961 F.2d at 315-317; *Cabasug*, 847 F.2d at 1327, and that is all that the Constitution requires.

Contrary to petitioner's argument (Pet. 7), the decision below does not conflict with the Second Circuit's decision in *Bedoya-Valencia* v. *INS*, 6 F.3d 891 (1993). In that case, the court held that Section 212(c) relief was available to an alien who had been found deportable under Section 241(a)(1)(B) of the INA, 8 U.S.C. 1251(a)(1)(B), for entering without inspection, a ground for deportation that is not cause for exclusion. The court reasoned that, in that context, the

absence of an analogous ground for exclusion said nothing about Congress's intent, because "entry without inspection [is] a ground for deportation which, as a matter of logic, cannot be a ground for exclusion." 6 F.3d at 897 (quoting *Leal-Rodriguez* v. *INS*, 990 F.2d 939, 950-952 (7th Cir. 1993)). The rule announced in *Bedoya-Valencia* has no application where an alien is deportable for a reason (such as conviction of a firearms offense) that could rationally be a ground for exclusion. See *Cato*, 84 F.3d at 599-600 (joining the other courts of appeals holding that Section 212(c) is unavailable to a deportee whose ground for deportation is conviction of a firearms violation).

2. On September 30, 1996, the President signed into law the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009. Section 304 of the IIRIRA repeals Section 212(c) in its entirety and replaces it with a new form of discretionary relief (termed "cancellation of removal") that applies equally to inadmissible and deportable aliens. See IIRIRA § 304(a) and (b). Cancellation of removal is available to any permanent resident alien who is inadmissible or deportable (including those who are deportable by reason of having been convicted of a firearms offense) "if the alien—(1) has been an alien lawfully admitted for permanent residence for not less than 5 years, (2) has resided in the United States continuously for 7 years after having been admitted in any status, and (3) has not been convicted of any aggravated felony." IIRIRA § 304(a). The new rules respecting cancellation of removal apply only to deportation proceedings initiated after April 1, 1997. IIRIRA § 309(a) and (c).

Although the IIRIRA has no application in this case, Congress's elimination of Section 212(c) in favor of a new provision that expressly provides for discretionary relief from deportation substantially diminishes the ongoing legal importance of the issue raised by petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1996